IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Civil Second Appeal No.138/1977

Niranjan Lal Todi (since deceased)
through his Legal Representatives
and Smt. Manbhari and Smt. Sampat Devi
...plaintiff-appellants
Versus
1/1 Shri Ram Ratan (since deceased)
through his Legal Representatives
1/2 Lachhmi Niwas
1/3 Dayal Bux
1/4 Smt. Jedi
1/5 Smt. Dropdi
2/1 Smt. Gulab Devi
2/2 Kailash
2/3 Smt. Sushila
...defendant-respondents
AND
3. Smt. Shanti Devi D/o late Gajanand Todi
4. Smt. Satwai D/o late Gajanand Todi
...proforma-respondents

Date of Judgment ::: 7.7.2006

Hon'ble Mr. Justice Narendra Kumar Jain

Shri B.L. Mandhana for plaintiff-appellants
Shri Bihari Lal Agrawal for defendant-respondents
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By the Court:-

This second appeal under Section 100 of the Civil Procedure Code, on behalf of the plaintiff-appellants, is directed against the judgment and decree dated 1st March, 1977 passed by the Civil Judge, Sikar, in Civil Regular Appeal No.73/1974, whereby he set aside the judgment and decree dated 19.3.1971 passed by the Munsiff, Sikar, in Civil Suit No.177/1969, whereby the suit of the plaintiff-appellants for eviction was decreed.

This court, vide order dated 6.10.1978, framed the

following substantial questions of law involved in this second appeal:-

> "1. Whether in a case where the defendant denies the title of the plaintiff, the prima facie evidence about the ownership of the property in question is relevant or not and can be looked and considered by the court or not? If so, what is the effect of the same when the learned Civil Judge ignored the said evidence holding it to be an irrelevant and unnecessary?
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> 2. Whether any adverse inference can be drawn against the plaintiff for the non-production of certain evidence regarding the difference in the boundaries of certain documents when the identity of the properties is not disputed in the trial court and no question is put either to the plaintiff or his witness in the cross-examination in getting an explanation for the difference in the boundaries specially when they had stated that the said documents related to the property in question?
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> 3. Whether the evidence of a handwriting expert which is a opinion evidence, can rebut the evidence of the plaintiff to prove the execution of the document? What is the effect on the opinion of a handwriting expert when the standard signatures are not taken after getting it certified by the Court and no evidence is led that they were the standard signatures of that person. In other words, the identity of the standard signatures is not proved then whether the opinion of a handwriting expert has got any value and relevancy?

I have heard the learned counsel for both the parties on the aforesaid substantial questions of law and

minutely scanned the judgments, impugned in this appeal, as well as the record of both the courts below.

The shop in dispute was taken on rent by the defendant about 60 years ago i.e. 1.4.1946. The tenant failed to make the payment of monthly rent, therefore, a suit for ejectment and for arrears of rent was filed by the original plaintiff Gajanand way back on 19th of May, 1965 against defendants Ram Kumar and Norang Rai. The original plaintiff as well as both the defendants have died during the pendency of the suit/appeal.

The suit for ejectment was filed on the ground of default in making the payment of rent. The description of the shop was given in the plaint. The defendants filed their written statement wherein they denied the default in making the payment of monthly rent. The defendants further denied the title of the property in favour of the plaintiff. On the basis of the pleadings of the parties the learned lower court framed eight issues, which are reproduced in the judgments of the courts below. The learned lower court while deciding issue no.1 recorded a specific finding, after considering oral and documentary evidence on the record, that the plaintiff was the owner of the property in dispute and the defendants are the tenants on it. So far as default in making the payment of rent is concerned, the learned lower court held that there was no default in payment of rent as the rent remained deposited with the defendants itself as per the instructions of the plaintiff. However the learned lower court granted a decree

of eviction of the disputed shop on the ground of denial of title. Being aggrieved with the same the defendants preferred regular first appeal before the first appellate court.

The first appellate court instead of deciding the appeal issue-wise, considered the question of identity of the disputed shop. The learned presiding officer of the first appellate court went at the spot to know the exact description of the shop in dispute. However, it is not in dispute that no 'site note' was prepared by the presiding officer. The said fact has been mentioned by the first appellate court itself in para 6 of the impugned judgment. The learned first appellate court after considering Exhibit-1, Exhibit-14, Exhibit-12 and Exhibit-13, recorded a finding that description of the shop in dispute as mentioned in the plaint is not correct and consequently while allowing appeal of defendants, set aside the judgment of the lower court decreeing the suit of the plaintiff for ejectment.

The learned counsel for the appellant contended that the identity/description of the shop in dispute was not disputed by the defendants in the written statement nor there was any issue in this regard. There was no evidence on behalf of the defendants but the first appellate court itself developed the said point without any pleading and evidence on the record and, as such, the finding of the learned first appellate court is liable to be set aside. He also referred the statements of the defendants' witnesses

wherein the identity of the shop in dispute was not challenged. He further contended that so far as denial of title of the plaintiff in respect of shop in dispute by the defendants is concerned, there is a documentary evidence in this regard. He referred th written statement as well as Exhibit-3, the reply given by the defendants to notice for ejectment given by plaintiff before filing suit, wherein the defendants denied the title of the plaintiff. He also referred the finding of the learned lower court in respect of issue no.1 wherein he considered oral and documentary evidence including Exhibit-1, the mortgage-deed, executed by original owner of the shop Abdul Aziz in favour of the plaintiff, who let out the shop in dispute to the defendants. Exhibit-11 was the rent note executed by the defendants, which was wrongly disbelieved by first appellate court. He, therefore, contended that the judgment of the learned first appellate court is not based even on the pleadings of the defendants in their written statement and defendants did not adduce any evidence in this regard, therefore, the finding of the learned first appellate court is liable to be set aside and the judgment of the lower court is liable to be restored. He also contended that the learned first appellate court committed an illegality in recording a finding that Exhibit-11, the rent-note, is not proved. He referred the statement of DW-5, Shri Krishna Charan, the hand-writing expert, and contended that in fact the rent-note was not disputed by the defendants and the statement of DW-5, Shri Krishna Charan, was not material,

relevant and trustworthy also and the same was liable to be discarded in view of the statements of the plaintiff's witnesses, who had specifically proved the Exhibit-11, the rent-note, in respect of the rented premises in dispute.

The learned counsel for the respondents supported the judgment of the first appellate court and contended that there is a variance in the description of the disputed shop in Exhibit-1, Exhibit-14, Exhibit-12 and Exhibit-13, therefore, the first appellate court was right in setting aside the decree of eviction passed by the lower court.

I have considered the submissions of the learned counsel for both the parties.

So far as issue no.1 is concerned, the learned lower court has recorded a specific finding that the plaintiff is the landlord of the disputed shop. The lower court has referred Exhibit-1, the mortgage-deed, which was executed by Abdul Aziz, who was the actual owner of the shop in dispute, and he mortgaged the same with the plaintiff. Thereafter the plaintiff let it out to the defendants. PW-10, Abdul Aziz has come in witness-box and proved the Exhibit-1. PW-9, the son of Jethmal, also stated that earlier the shop was mortgaged with his father vide Exhibit-14 and it had been let out to one Laxmi Narain vide rent-note Exhibit-13. PW-10 Abdul Aziz has admitted this fact. Subsequently the said shop was mortgaged with the plaintiff and it was let out to the defendants. The learned lower court, after considering the oral and documentary evidence, decided issue no.1 in favour of the plaintiff and

held that the shop in dispute was belonging to Abdul Aziz, who had mortgaged it with the plaintiff. The issue no.2 was also decided in favour of the plaintiff.

The plaintiffs have described the boundaries of the shop in dispute in para 1 of the plaint as under:-

> "1. towards east side – Haveli Chhaganlal Mahajan
> 2. towards west side – Way
> 3. towards north side – shop of Yasin Karigar
> 4. towards south side – shop of Chhaganlal"

The defendants filed their written statement wherein they admitted the description of the shop towards eastern, western and southern side. So far as the northern side is concerned, the defendants gave correct description and it was pleaded that in fact towards northern side, the shop of Surajmal Mohanlal is situated. Para 1 of the plaint and para 1 of the written statement both are reproduced for ready reference:-

> "यह कि शहर सीकर में नया शहर में एक दुकान पश्चिम झांकती दो खण की है। इस दुकान का वादी मुर्तहिन बाकब्जा है। हदूद अर्बा दुकान हस्ब जैल है:-
>
> 1. पूर्व में- हवेली छगन लाल महाजन की। पश्चिम में रास्ता।
> उत्तर में- यासीन कारीगर की दुकान - दक्षिण में दुकान छगन लाल जिसका वादी मुर्तहिन है।
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> 1. यह कि अर्जी दावा का पैरा नं.1 जिस प्रकार से लिखा गया है, स्वीकार नहीं है। क्योंकि दुकान जैर बहस वादी मुर्तहिन की नहीं है। और न वादी मुर्तहिन है बल्कि दुकान जैर बहस प्रतिवादीगण की ममलूका व मकबूजा है और अर्सा 40 साल

से स्वयम् प्रतिवादीगण दुकान जैर बहस में बैठते चले आ रहे हैं और प्रतिवादी के बुजुर्गों के टाइम से उनके कब्जे व मिल्कियत में चली आ रही है। हदुदर्बा दुकान जैर बहस जो दिये गये हैं वोह गलत हैं सही दहूदर्बा इस प्रकार है। पूरब में हवेली छिगन लाल महाजन, पश्चिम में रास्ता सड़क, उत्तर में दुकान सूरजमल मोहन लाल जो प्रतिवादीगण के यँ पर किराये पर है। दक्षिण में दुकान छिगन लाल महाजन।"

The above contents of para 1 of the written statement clearly shows that identity of the shop was not disputed but 3/4th description towards east, west and south, as mentioned in the plaint was specifically admitted and so far as 1/4th description towards northern side is concerned, the correct description was given by the defendants. The defendants did not dispute the identity of the shop, therefore, no specific issue about identity of the shop was framed by the lower court and no evidence was led by either party in this regard. In fact there was no occasion for the learned presiding officer of the first appellate court to go at the spot and to make an enquiry about identity of the shop in dispute. The learned first appellate court did not reduce his report in writing and the same is not available on the record and he himself mentioned this fact in para 6 of the judgment that he did not think it fit and proper to prepare the note of site inspection. In absence of site inspection note of the first appellate court the true description of the shop, as alleged by the first appellate court, cannot be tallied with the description of shop as mentioned in the plaint. In my opinion in absence of any specific objection in the written statement and issue in this regard the learned first appellate court committed an

illegality in going at the spot and deciding the first appeal on that basis particularly without preparing any site inspection note in writing.

After considering the submissions of the learned counsel for the parties as well as the pleadings of the parties I am satisfied that the identity of the shop in dispute is not disputed and the description of the shop disclosed in para 1 of the plaint is correct. It is also relevant to mention that before filing a suit for ejectment the plaintiff served a notice dated 7.1.1965 on the defendants describing the boundaries of the rented shop in para 1 and the said description of the shop in dispute was not denied by the defendants in their reply to the notice. The copies of the notice and the reply have been placed on the record as Exhibit-2 and Exhibit-3. The contents of para 1 of the reply to notice shows that in fact the defendants admitted the identity of the shop but their contention was that the defendants are the actual owner of the shop. Therefore, from Exhibits 2 and 3 also the identity of the shop is not disputed and the finding of the learned first appellate court is absolutely illegal and perverse. The first appellate court has not cared to consider the contents of para 1 of the plaint as well as the written statement and also the notice and its reply Exhibit-2 and Exhibit-3 and wrongly recorded a finding against the plaintiff-appellant.

So far as Exhibit-11, the rent-note, is concerned, it is suffice to say that the same was proved from the

statement of the plaintiff's witnesses. The entire document was written by the defendant Ram Kumar whereas DW-5 Shri Krishna Charan, hand-writing expert, who took the standard signature of defendant, stated only in respect of the signature of defendant Ram Kumar. It is also relevant to mention that the standard signature of defendant on rent-note was not taken in presence of court and the same was not attested by the court. The Advocate before whom the standard signature was taken by DW-5, was not examined, therefore, there was no corroboratory evidence to support the statement of hand-writing expert DW-5 Shri Krishna Charan. It is also relevant to mention that the evidence of the hand-writing expert is only an opinion and cannot be a conclusive evidence in the eye of law. Therefore, the learned first appellate court committed an illegality in disbelieving upon the document Exhibit-11, rent-note, which was proved by the plaintiff's witnesses.

In view of the above discussion, all the questions formulated above in the appeal are to be answered in favour of the plaintiff-appellants and the same are decided in favour of the plaintiff-appellants.

Consequently, this second appeal is allowed and the impugned judgment dated 1.3.1977 passed by the Civil Judge, Sikar, in Civil Regular Appeal No.73/1974 is set aside, and the judgment and decree dated 19.3.1971 passed by the Munsiff Magistrate, Sikar, in Civil Suit No.177/1969 is restored. No order as to costs.

The learned counsel for the defendant-respondents

Shri Agarwal contended that he has telephonic instructions from the defendants-tenants that they will vacate the rented shop but in view of the fact that they are tenants in the rented shop for last about 60 years, therefore, he should make a request to this court that at-least time of two years may be granted to them to handover peaceful and vacant possession of the rented premises to the plaintiff-appellants. The learned counsel for the plaintiff-appellants submits that a reasonable time, which this court thinks fit and proper, may be granted to the respondents to handover the possession of the rented shop, but respondents may be directed to file a written undertaking in this behalf.

After considering the submissions of the learned counsel for both the parties, particularly the submission of Shri Agarwal, the learned counsel for respondents, that tenants have agreed to vacate the rented shop within two years, it is ordered that the tenant-defendants shall not be evicted from the rented shop, till 7th of July, 2008 subject to following conditions:-

1. The defendant-respondents shall furnish a written undertaking in the lower court within a period of two weeks from today to hand-over the vacant and peaceful possession of the rented premises/shop, in dispute, to the plaintiff-appellant on or before 7th of July, 2008.

2. The defendant-respondents undertake to pay or deposit the entire arrears of rent, if any, within a period of one month from today and will

further continue to pay the mesne profit by 15th day of every succeeding month or in advance to the plaintiff-appellants at the rate of Rs.100/- per month from today, till the defendant-respondents give possession of the rented shop to the plaintiff-appellants.

3. The defendant-respondents will also file an undertaking that they shall not sub-let, assign or part with the possession of the rented premises or any part thereof in favour of any one else and would not create any third party interest in the same during the aforesaid period.

It is made clear that in case the defendant-respondents do not comply with any of the aforesaid conditions including filing of the written undertaking within the period of two weeks, then it will be open for the plaintiff-appellants to get the decree of eviction passed in their favour executed even before the aforesaid date and to initiate contempt proceedings in this court also.

(Narendra Kumar Jain) J.

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